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Nos. 16-1436 and 16-1540

IN THE
Supreme Court of the United States

DONALD J. TRUMP, PRESIDENT OF THE UNITED STATES, ET AL., *Petitioners*,
v.
INTERNATIONAL REFUGEE ASSISTANCE PROJECT, ET AL., *Respondents*.

DONALD J. TRUMP, PRESIDENT OF THE UNITED STATES, ET AL., *Petitioners*,
v.
STATE OF HAWAII, ET AL., *Respondents*.

On Writs of Certiorari to the United States Courts of Appeals for the Fourth and Ninth Circuits

MOTION FOR LEAVE TO FILE AND BRIEF AMICUS CURIAE OF THE FOUNDATION FOR MORAL LAW IN SUPPORT OF PETITIONERS

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MOTION OF FOUNDATION FOR MORAL LAW FOR LEAVE TO FILE AMICUS BRIEF IN SUPPORT OF PETITIONERS

The Foundation for Moral Law respectfully moves for leave of Court to file the accompanying amicus brief under Supreme Court Rule 37.3(b). Counsel for the petitioner has filed a blanket consent. The Foundation has been unable to obtain consent from all the respondents.

Amicus Curiae Foundation for Moral Law ("the Foundation") (www.morallaw.org) is a national public-interest organization based in Montgomery, Alabama, dedicated to the strict interpretation of the Constitution as written and intended by its Framers and the right to acknowledge God in the public arena.

The Foundation believes America was founded as a constitutional republic based upon legal and moral principles set forth in the Bible. Those principles are reflected in the Establishment Clause, at issue in this case. In conformity with its mission to further a Biblical understanding of law, the Foundation desires for the Court to have an understanding of Biblical principles about immigration. In furtherance of its mission of strictly interpreting the Constitution, the Foundation also wishes to explain why the nationwide injunctions issued in these cases fail to conform with the limits of judicial power defined in Article III of the Constitution.

For these reasons, The Foundation for Moral Law requests that the Court grant leave to file its amicus brief.

August 17, 2017

Respectfully submitted,

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INTEREST OF AMICUS CURIAE[1]

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The Foundation believes America was founded as a constitutional republic based upon legal and moral principles set forth in the Bible. Those principles are reflected in the Establishment Clause, at issue in this case. In conformity with its mission to further a Biblical understanding of law, the Foundation desires for the Court to have an understanding of Biblical principles about immigration. In furtherance of its mission of strictly interpreting the Constitution, the Foundation also wishes to explain why the nationwide injunctions issued in these cases fail to conform with the limits of judicial power defined in Article III of the Constitution.

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[1] Counsel for the petitioner has filed a blanket consent. The Foundation has been unable to obtain consent from all the respondents. Pursuant to Rule 37.6, no party or party's counsel authored this brief in whole or in part, or contributed money that was intended to fund its preparation or submission; and no person other than the *amici curiae*, their members, or their counsel, contributed money that was intended to fund the preparation or submission of this brief.

SUMMARY OF ARGUMENT

- The Establishment Clause applies less stringently in foreign affairs, and the travel ban has a secular national-security purpose.
- The travel ban is compatible with the teaching of the Bible on immigration.
- The universal injunctions issued in these cases violate Article III of the Constitution.

ARGUMENT

I. The travel ban does not violate the Establishment Clause.

A. The Establishment Clause has a narrower application to foreign affairs than to domestic matters.

The United States correctly asserts that this Court has uniformly held that when the Executive exercises the power to exclude aliens "on the basis of a facially legitimate and bona fide reason, the courts will [not] look behind the exercise of that discretion." *Kleindienst v. Mandel*, 408 U.S. 753, 770 (1972).

The early history of this country supports the conclusion that establishment concerns are more attenuated in regard to foreign affairs.

One of the most ardent advocates of separation of church and state, Thomas Jefferson, said in his Second Inaugural Address,

> In matters of religion I have considered that its free exercise is placed by the Constitution independent of the powers of the General Government. I have therefore undertaken on no occasion to prescribe the religious exercise suited to them, but have left them, as the Constitution found them, under the direction and discipline of the church or state authorities acknowledged by the several religious societies.[2]

Justice Joseph Story stated that "the whole power over the subject of religion is left exclusively to the State governments, to be acted upon according to their own sense of justice and the State Constitutions."[3]

From these and other statements of the Framers, Professor Robert L. Cord concludes:

> [R]egarding religion, the First Amendment was intended to accomplish three purposes. First, it was intended to prevent the establishment of a national church or religion, or the giving of any religious sect or denomination a preferred status. Second, it was designed to safeguard the right of freedom of conscience in religious beliefs against invasion solely by the national Government. Third, it was so constructed

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[2] Thomas Jefferson, *Second Inaugural Address* (1805), http://avalon.law.yale.edu/19th_century/jefinau2.asp.

[3] Joseph Story, *Commentaries on the Constitution* § 1879 (1833).

> in order to allow the States, unimpeded, to deal with religious establishments and aid to religious institutions as they saw fit.[4]

This third purpose of the First Amendment—preventing federal interference with the States in their dealing with religion— clearly does not apply to the Federal Government in its dealings in foreign affairs such as immigration. Consequently, the Confederation Congress and early Presidents such as Jefferson interacted with religion in foreign affairs in ways that they would not have done in domestic matters.

For example:

- The Preamble to the Northwest Ordinance of 1787 states: "Religion, morality and knowledge, being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged." Because the Northwest Ordinance applied to territories that were not yet states, it was not seen as conflicting with the later-adopted First Amendment.

- Another Act of Congress in 1787 reserved special lands "for the sole use of Christian Indians" and reserved lands for the Moravian Brethren "for civilizing the Indians and promoting Christianity."[5] This act was

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[4] Robert L. Cord, *Separation of Church and State: Historical Fact and Current Fiction* 15 (Baker Book House 1988) (1982).

[5] *Id.* at 41.

renewed in 1796 as "An Act regulating the grants of land appropriated for Military services and for the Society of the United Brethren for propagating the Gospel among the Heathen."[6]

- In 1803 Congress ratified a treaty proposed by the Jefferson Administration with the Kaskaskia Indians that provided, among other things, for a federal stipend of $100 annually for seven years for the support of a Catholic priest to minister to the Kaskaskia Indians. Similar treaties were made with the Wyandotte Indians in 1806 and with the Cherokees in 1807.[7]

These and other examples indicate that Jefferson and other early Presidents did not understand the Establishment Clause to restrict them in foreign affairs to the same extent that it restricted them in domestic matters.

B. By failing to give proper weight to the national-security purpose of the travel ban, the Fourth Circuit misapplied the "secular purpose" prong of *Lemon*.

In light of the historical analysis above, it is doubtful whether the *Lemon* test, *Lemon v. Kurtzman*, 403 U.S. 602 (1971), or the "endorsement test," *Lynch v. Donnelly*, 465 U.S. 668 (1984), provides an appropriate framework for analysis of

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[6] *Id.*

[7] *Id.* at 38-39.

this case. A more fitting framework is the "historical precedent" test of *Marsh v. Chambers*, 463 U.S. 783 (1983), in which this Court held that uninterrupted practices which predate the First Amendment, such as legislative chaplains, are sanctioned and approved by the First Amendment.

However, even if the *Lemon* test is appropriate in this case, the Fourth Circuit misapplied the secular purpose prong.

The first prong of the *Lemon* test asks whether there is a secular purpose. It does not require that the secular purpose be the only purpose nor does it even require that the secular purpose be the main purpose. It requires only that there be a secular purpose that is legitimate and not a sham.

The purpose of the travel ban—protecting America from terrorism—is as clear a secular purpose as anyone could possibly imagine. Candidate Trump's motives in advocating a travel ban—whether to gain votes or any other purpose—are irrelevant.

Although determining subjective intent is a perilous enterprise, *see, e.g.*, *Edwards v. Aguillard*, 482 U.S. 578, 636-39 (1987) (Scalia J. dissenting) (explaining the impossibility of accurately discerning the motives that underlie passage of legislation in a multi-member body), the existence of any secular purpose is sufficient to satisfy *Lemon*. The national-security purpose that is evident on the face of the executive order, far from being pretextual, has sound evidentiary support that dispels the allegation that

the purpose of the order was to "disapprove of religion." *Lynch v. Donnelly*, 465 U.S. 668, 690 (O'Connor, J., concurring).

Nowhere can the Fourth Circuit bring itself to deny that there is a genuine concern about terrorism in the United States and worldwide, that the six nations under the travel ban have been the origin of many terrorists, that abundant evidence exists that these six nations have fomented and supported terrorism, or that these six nations have been unable to "vet" those who would emigrate to determine which of them might have criminal backgrounds or tendencies toward terrorism. Nor can the Fourth Circuit deny that combating terrorism is a legitimate secular purpose. Each of these individually, and all of them combined, certainly constitute a secular purpose for the travel ban.

But the Fourth Circuit ignored these legitimate concerns and secular purposes and focused instead upon statements by Donald Trump, most of them before he was elected or inaugurated, that supposedly indicate a religious purpose or motive for the travel ban.

The Fourth Circuit did not consider the extent to which terrorist attacks in the United States and worldwide are conducted by Muslims, or the extent to which Muslim terrorists are motivated by their understanding of Islam to commit terrorist acts.[8] The

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[8] Passages in the Koran which some have interpreted to call for *jihad* include 2:190-93, 216, 217, 246; 4:74-78, 91, 104; 9:5, 29, 36, 41, 84, 123; and 47:4-6. *See Quran in English* (Talal Itani, trans.), http://www.clearquran.com. For evidence of the

Fourth Circuit did not consider the question whether, if in fact a religious group is promoting terrorism, there is a secular purpose in identifying the source of that terrorist ideology, even if Candidate Trump did not identify that source with the precision he might have used later in the campaign or during his Presidency. Instead, the Fourth Circuit took out of context a few statements made by Candidate Trump, imputed them to President Trump and all those in his Administration who had a role in developing and implementing the travel ban.

The Fourth Circuit effectively accused President Trump of duplicity by first identifying the problem as Muslim terrorism and then limiting the travel ban to specific countries. The opinion cites former New York City Mayor Rudolph Giuliani as claiming Trump told him to "Put a commission together. Show me the right way to do it legally." *Int'l Refugee Assistance Project v. Trump*, 857 F.3d 554, 577 (4th Cir. 2017). The most sensible interpretation is that Mr. Trump, who is not a lawyer, sincerely wanted to find a way to stop radical terrorism in a way that does not violate the Constitution. But the Fourth Circuit misconstrued this to mean that the President was trying to evade the Constitution rather than comply with it.

The Fourth Circuit also overlooked the reality that the six nations directly affected by the travel ban—Iran, Libya, Somalia, Sudan, Syria, and

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violent side of Islam, *see* David Benjamin and Steven Simon, *The Age of Sacred Terror: Radical Islam's War Against America* (2005); Efraim Karsh, *Islamic Imperialism: A History* (2006).

Yemen— have a combined population of about 166 million people.[9] Since the global Muslim population is about 1.6 billion,[10] then only 10.4% of the world's Muslims are affected by the travel ban. Moreover, those six countries range from Sudan which is 71.4% Muslim to Iran which is 99.7% Muslim.[11] Christians, Jews, and persons of other religions who live in those countries are also affected by the ban.

Furthermore, other nations with significant Muslim populations (some with higher percentages than those nations included in the ban) are not included in the ban because they do not export terrorism or are able to "vet" their potential emigrants. Those include Afghanistan (99.8% Muslim), Algeria (98.2%), Azerbaijan (98.4%), Bahrain (81.2%), Bangladesh (90.4%), Comoros (98.3%), Djibouti (97%), Egypt (94.7%), Gambia (95.3%), Guinea (84.2%), Indonesia (88.1%, and the largest Muslim population of any nation in the world), Iraq (98.9%), Jordan (98.8%), Kosovo (91.7%), Kuwait (86.4%), Kyrgyzstan (88.8%), Maldives (98.4%), Mali (92.4%), Mauritania (99.2%), Mayotte (98.8%), Morocco (99.9%), Niger (98.3%), Oman (87.7%), Pakistan (96.4%), Palestinian Territories (97.5%), Qatar (77.5%), Saudi Arabia (97.1%), Senegal (95.9%), Tajikistan (99%), Tunisia (99.8%), Turkey (98.6%), Turkmenistan (93.3%), United Arab

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[9] These population figures are for 2010. Pew Research Center, *Table: Muslim Population by Country* (Jan. 27, 2011), https://goo.gl/a76kVk.

[10] Pew Research Center, *Muslim-Majority Countries* (Jan. 27, 2011), https://goo.gl/cRwzpt.

[11] *Muslim Population by Country*, *supra* n.9.

Emirates (76%), Uzbekistan (96.5%), and Western Sahara (99.6).[12]

It is difficult to understand how a travel ban that applies to only six nations that are known to export terrorism and cannot or will not "vet" prospective emigrants, that also applies to non-Muslims living in those six countries, that applies to only 10.4% of the world's Muslims, and that does not apply to at least 35 majority-Muslim nations, is aimed at religion, is motivated by religious "animus," and has no secular purpose.

Furthermore, the travel ban has been further tailored so that it does not restrict people who already have visas, and is in effect for only 90 days for the six nations and 120 days for all refugees.

The United States has definitely satisfied the "secular purpose" prong of the *Lemon* test. Keeping the American people safe from terrorism is as clear and important a secular purpose as one can imagine.[13]

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[12] *Id.*

[13] Because the Fourth Circuit did not reach the second and third prongs of the *Lemon* test, the Foundation also does not address them.

II. The teaching of the Bible is compatible with limiting the immigration of foreign nationals who may be seeking entry into a country to harm its people.

A number of religious organizations, including those with an emphasis on refugee resettlement, filed an amicus brief earlier in this case suggesting that Biblical principles required them to support the respondents. *See* Case Nos. 16A1190 & 16A1191, *Brief for Interfaith Group of Religious and Interreligious Organizations as Amici Curiae Supporting Respondents' Oppositions to the Stay Applications* (June 12, 2017). Similarly, other religious organizations suggested last year in *United States v. Texas*, 136 S. Ct. 2271 (2016) that their Christian principles required them to support President Obama's executive order granting amnesty to millions of illegal immigrants. Case No. 15-674, *Amicus Curiae Brief of Faith-Based Organizations In Support of the United States and Reversal*, at 10 (quoting *Leviticus* 19:33-34).

As a Christian organization, the Foundation would like to provide a fuller perspective on what the Bible says about immigrants.

At the inception of America as a nation, the *Declaration of Independence* (1776) invoked "the laws of nature and of nature's God" as justification for separation from Britain. *Id.*, para. 1.[14] Blackstone

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[14] The United States Code recognizes the Declaration of Independence as part of this nation's "organic laws." *Black's Law Dictionary* defines "organic law" as "[t]he body of laws (as

explained that the "law of nature" is "the will of [man's] Maker[.]" 1 William Blackstone, *Commentaries on the Laws of England* *39. Although God made the law of nature accessible through human reason, He also delivered that law through "an immediate and direct revelation." *Id.* at *42.

> The doctrines thus delivered we call the revealed or divine law, and they are to be found only in the holy scriptures. ...
>
> Upon these two foundations, the law of nature and the law of revelation, depend all human laws; that is to say, no human laws should be suffered to contradict these.

Id. The Declaration's invocation of divine law makes Biblical analysis peculiarly relevant to American law.

A. God ordained governments to protect people from evildoers.

As John Locke recognized, mankind has the authority to establish earthly governments "according to that pact[] which God made with Noah after the deluge." John Locke, *Second Treatise of Government* § 200 (1689) (quoting King James I), *reprinted in Classics of Political and Moral Philosophy* 496 (Steven M. Cahn ed., 2002) *See also* John Eidsmoe, *Christianity and the Constitution* 61

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in a constitution) that define and establish a government." *Black's Law Dictionary* 1274 (10th ed. 2014).

n.20 (2008) (citing other parts of Locke's writings that reflect this proposition).

Government is a mechanism to create and enforce laws. Thus, a prime function of government is to punish lawbreakers. The first indication in Scripture of authorization for government by earthly rulers appears among the commands that God gave to Noah after the flood: "Whoso sheddeth man's blood, by man shall his blood be shed: for in the image of God made he man." *Genesis* 9:6.[15] Agreeing with Locke, theologian Wayne Grudem argues that this passage is the "first indication of God's establishment of civil government in human society," reasoning that this mandate gave man the authority to execute the greatest punishment for the greatest crime as well as lesser punishments for lesser crimes. Wayne Grudem, *Politics According to the Bible* 77 (2010).[16]

Thus, the first command in the Bible of a governmental nature provided for the punishment of those who hurt innocent people. The New Testament likewise affirms that civil government exists to protect the innocent and punish those who do evil. *See Romans* 13:3-4 (stating that the ruler "is the minister of God, a revenger to execute wrath upon

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[15] All Scripture quoted herein is from the King James Version unless otherwise noted.

[16] The first mention of formal government appears one chapter later in *Genesis* 10:10 (speaking of the beginning of the "kingdom" of Nimrod), a further indication that *Genesis* 9:6 was the first mandate for civil government. God gave governmental authority to mankind in general, but it appears that mankind quickly vested this power in civil governments in order to avoid anarchy.

him that doeth evil"); *I Peter* 2:13-14 (noting that rulers "are sent by him for the punishment of evildoers, and for the praise of them that do well").

Those two passages were cited more than any other Bible passages during America's founding era. Donald Lutz, *The Origins of American Constitutionalism* 140 (1988). Indeed, the Bible was the most cited source during America's founding period. *Id.* at 141. *Accord* Eidsmoe, *supra*, at 52; David Barton, *Original Intent: the Courts, the Constitution, and Religion* 232 (2008). Thus, the view that the primary purpose of government is to protect the innocent and punish the evildoer is not only fundamentally Biblical but also fundamentally American.

B. Although the Bible forbids oppression of foreigners, it does not require a country to have open borders.

The Bible teaches that God "hath made of one blood all nations of men for to dwell on all the face of the earth, and hath determined the times before appointed, *and the bounds of their habitation*." *Acts* 17:26 (emphasis added). Contrary to the liberal notion of borderless nations, the Bible teaches not only that nations are authorized to establish borders, but also that those borders have been established by God. Returning to *Genesis*, we see that the same God who ordered humanity to fill the earth (impliedly giving mankind the right to travel) also scattered mankind over the face of the earth so that they formed separate nations. *See Genesis* 9:1 (ordering mankind to "be fruitful and multiply" and "fill the

earth"); 10:32 (noting that "the nations [were] divided in the earth after the flood"). Because God established both nation-states and their boundaries, it is reasonable to infer that a nation's government may exclude aliens for good cause if it is in the best interests of the nation. *See* Grudem, *supra*, at 472 (arguing, at the end of a Biblical analysis of immigration, that it is appropriate "to *exclude* those with a criminal record, those who have communicable diseases, or those who otherwise give indication that their overall contribution would likely be negative rather than positive in terms of advancing the well-being of the nation.") .

It is certainly true that God commanded the Israelites to be kind to the strangers among them. *See, e.g.*, *Exodus* 22:21 ("Thou shalt neither vex a stranger, nor oppress him: for ye were strangers in the land of Egypt."); *Leviticus* 19:33-34 ("And if a stranger sojourn with thee in your land, ye shall not vex him. But the stranger that dwelleth with you shall be unto you as one born among you, and thou shalt love him as thyself; for ye were strangers in the land of Egypt: I am the LORD your God."). However, the Bible uses different Hebrew words when talking about different groups of aliens. The word used in *Exodus* 22:21 and *Leviticus* 19:33-34 for "stranger" is "*ger*," which refers to "'a person who entered Israel and followed legal procedures to obtain recognized standing as a resident alien.'" Grudem, *supra*, at 470-71 (quoting James Hoffmeier, *The Immigration Crisis: Immigrants, Aliens, and the Bible* 52 (2009)). *See also* 1 Rousas John Rushdoony, *The Institutes of Biblical Law* 530 (1973) (describing the "strangers" in these verses as "permanent residents of the

community"). Other Hebrew words were used to designate foreigners who were not necessarily entitled to the same privileges. *See* Grudem, *supra*, at 471. Thus, as long as all foreigners are "dealt with in a humane manner," it is both "legally and morally acceptable" to exclude non-resident aliens for good cause. *Id.*

The Old Testament has multiple examples of immigration restrictions. Perhaps the best example is found in *Deuteronomy* 23:3-4, which reads:

> An Ammonite or Moabite shall not enter into the congregation of the LORD; even to their tenth generation shall they not enter into the congregation of the LORD for ever:
>
> Because they met you not with bread and with water in the way, when ye came forth out of Egypt; and because they hired against thee Balaam the son of Beor of Pethor of Mesopotamia, to curse thee.

The Ammonites and Moabites were hostile towards Israel from the moment that Israel tried to enter the Promised Land; therefore God refused to allow them to even *enter* His assembly. *See Exodus* 17:14-16 (declaring a permanent state of war with the Amalekites because they attacked the Israelites on their way from Egypt to the Promised Land). Even foreigners from nations that God favored still had to wait before they could join the congregation. *Deuteronomy* 23:7-8 (providing that Egyptians and Edomites could join the congregation "in their third generation"). In addition, when the Israelites

returned from the exile in Babylon, they forbade both Samaritans and Israelites who had intermarried with surrounding the peoples (in violation of God's command) from helping rebuild the Temple. See *Ezra* 4:1-3. *See also Ezra* 9-10. Thus, the Bible not only permitted but required excluding foreigners for national security or religious reasons under certain circumstances.

C. The President's Executive Order is compatible with Biblical teaching.

In the executive order at issue in this case, the President of the United States found that "conditions in six [countries] demonstrate why their nationals continue to present heightened risks to the security of the United States[.]" Exec. Order No. 13780, 82 Fed. Reg. 13209, 13210 (Mar. 6, 2017). Finding that the risk of "erroneously permitting entry of a national of one of these countries who intends to commit terrorist acts or otherwise harm the national security of the United States is unacceptably high," the President imposed a temporary ban on the entry of these nationals for 90 days while our screening procedures were evaluated. *Id.* at 13211. Congress granted the President this authority under 8 U.S.C. §§ 1182(f) and 1185(a).

As demonstrated above, the first duty of government is to punish the wicked and protect the innocent. *Genesis* 9:5-6; *Romans* 13:1-7; *I Peter* 2:14-15. The main responsibility of any civil government is to protect its own people. By entering the aforementioned executive order, the President *complied* with the obligations of Scripture; he did not

violate them, as liberal religious groups would have this Court believe. In addition, this case is very much like *Deuteronomy* 23:3-4, where God imposed a severe immigration restriction against nationals from Moab and Ammon because of their people's hostility towards Israel. Of course, not every person from Moab or Ammon was hostile towards Israel, just as every person from these six countries is not hostile towards the United States. *See Ruth* 1:16 (Ruth the Moabite pledging to make Israel's God her God); *II Samuel* 10:2 (noting that Ammonite King Nahash "shewed kindness" to Israelite King David). But the friendliness of some Ammonites and Moabites towards Israel did not negate God's command, which was based on those nations' overall hostility towards Israel. In the same way, the Bible does not prohibit the President from implementing a temporary travel ban as to six designated nations.[17]

Both the general Biblical principles about the role of government and the specific history of excluding nationals from hostile countries demonstrate that there is nothing unbiblical about the President's executive order.

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[17] The executive order also allows for waivers on a case-by-case basis. 82 Fed. Reg. 13214-15.

III. The universal injunctions issued in these cases violate Article III of the Constitution.

A. Neither case is a class action.

Neither of the cases on appeal is a class action. In *Int'l Refugee Assistance Project v. Trump*, 857 F.3d 554 (4th Cir. 2017) ("*IRAP*"), the court stated: "This action was brought by *six individuals*, all American citizens or lawful permanent residents who have at least one family member seeking entry into the United States from one of the Designated Countries, *and three organizations* that serve or represent Muslim clients or members." *Id.* at 577 (emphasis added). After finding that plaintiff Doe #1 had standing to litigate his Establishment Clause claim, the Fourth Circuit did not bother to determine the standing of the other plaintiffs. "[B]ecause we find that at least one Plaintiff possesses standing, we need not decide whether the other individual Plaintiffs or the organizational Plaintiffs have standing with respect to this claim." *Id.* at 586. *See Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, 547 U.S. 47, 52 n. 2 (2006) (stating that "the presence of one party with standing is sufficient to satisfy Article III's case-or-controversy requirement"). Thus, the Fourth Circuit affirmed a national injunction for the benefit of every person in the United States who might be affected by the President's executive order on the basis of a finding that a single individual had standing to bring the case.[18]

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[18] And even that standing is now in question. *See Trump v. Int'l Refugee Assistance Project*, Nos. 16-1436 and 16-1540 (June

In *State of Hawaii v. Trump*, 859 F.3d 741 (9th Cir. 2017) ("*Hawaii*"), the Court of Appeals held that both of the plaintiffs, the State of Hawaii and Dr. Ismail Elshikh, had standing. The Ninth Circuit, like the Fourth Circuit, did not limit its relief to redressing the grievances of the parties before it but instead issued an injunction for the benefit of anyone in the United States who might be affected by the executive order at issue in the case.

Neither court of appeals provided a detailed explanation of its decision to grant relief for the benefit of unknown persons who were not before the court. The Fourth Circuit's justification of the nationwide scope of relief covered only 1 1/2 pages in a 79-page opinion. *IRAP*, 857 F.3d at 604-05. The Ninth Circuit similarly devoted a mere 2 pages out of 81 to the scope of relief. *Hawaii*, 859 F.3d at 787-88. Yet the impact of those orders on national immigration policy depended as much on the scope of the remedies as it did on the holdings on the merits. Had the two courts of appeals limited their relief to the plaintiffs before them, as the contours of judicial power require in the absence of a class action, this case would probably not be before the Court. But the sweeping scope of the relief imposed necessitated immediate review.

26, 2017), slip opinion, at 7 n.* (noting that counsel for Doe had informed the Court that Doe's wife had recently received a visa).

B. A court has no power to issue a decree for the benefit of a nonparty.

Laws by their nature apply to everyone but the judgments of courts apply only to the parties in the action.[19] "Courts do not write legislation for members of the public at large; they frame decrees and judgments binding on the parties before them." *Additive Controls & Measurement Sys. v. Flowdata, Inc.*, 96 F.3d 1390, 1394 (Fed. Cir. 1996). Thus, in the absence of a plaintiff who is suffering an actual or imminent injury traceable to the actions of a defendant and that is redressable by a judicial decree, a court has no authority to act. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). A judgment binds the defendant for the benefit of the plaintiff but extends no further.

The necessity for standing separates judicial from executive or legislative power. "[T]he law of Art. III standing is built on a single basic idea — the idea of separation of powers," *Allen v. Wright*, 468 U.S. 737, 752 (1984), and is "a constitutional principle that prevents courts of law from undertaking tasks assigned to the political branches." *Lewis v. Casey*, 518 U.S. 343, 349 (1996). "[T]he core component of standing is an essential and unchanging part of the case-or-controversy requirement of Article III." *Lujan*, 504 U.S. 560. Nonparties by definition have no standing to participate in a case.

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[19] Judgments also bind those "in privity" with a defendant. *Regal Knitwear Co. v. NLRB*, 324 U.S. 9, 14 (1945). *See* Rule 65(d)(2), Fed. R. Civ. P.

Persons not parties to a case can argue the persuasiveness of the ruling for adoption as a precedent in cases to which they are a party but cannot themselves enforce that judgment by contempt proceedings against the defendant in the original case. If a party who is found to lack standing is not entitled to have its legal rights adjudicated by a court, neither may a nonparty who never sought standing at all enjoy the benefit of a judgment to which it was not a party.

C. The lower courts' practice of issuing universal injunctions violates the limits on judicial power stated in Article III.

"The judicial Power of the United States shall be vested in one supreme Court and in such inferior Courts as the Congress may from time to time ordain and establish." U.S. Const. art. III, § 1. What is the nature of that "judicial power"? "The judicial Power shall extend to all cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their authority[.]" *Id.* § 2, cl. 1. The Constitution lists additional "cases" to which the judicial power extends and also certain "controversies." *Id.* Hence arises the familiar phrase "cases and controversies" as a constitutional limitation on the exercise of federal judicial power.

> Article III of the Constitution limits the "judicial power" of the United States to the resolution of "cases" and "controversies." The constitutional power of federal courts

> cannot be defined, and indeed has no substance, without reference to the necessity "to adjudge the legal rights of litigants in actual controversies."

Valley Forge Christian College v. Americans United for Separation of Church and State, Inc., 454 U.S. 464, 471 (1982) (quoting *Liverpool S. S. Co. v. Commissioners of Emigration*, 113 U. S. 33, 39 (1885)). A court may constitutionally decide only "the legal rights of litigants." It has no authority to determine the legal rights of nonlitigants. A nationwide injunction that purports to control the actions of a defendant not merely against the plaintiff but against anyone in the world is flatly unconstitutional.

Federal courts have no general mandate to repeal laws or nullify executive actions that they find repugnant to the Constitution. The only power they possess is to enforce judgments upon the parties before the Court and no one else.

> [T]he philosophy that the business of the federal courts is correcting constitutional errors, and that "cases and controversies" are at best merely convenient vehicles for doing so and at worst nuisances that may be dispensed with when they become obstacles to that transcendent endeavor ... has no place in our constitutional scheme.

Valley Forge, 454 U.S. at 489. As envisioned by the Constitution, "[t]he Judiciary would be, 'from the nature of its functions, ... the [department] least

dangerous to the political rights of the constitution' ... *because the binding effect of its acts was limited to particular cases and controversies.*" *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 223 (1995) (emphasis added) (quoting *The Federalist No. 78* (Alexander Hamilton), at 522).

D. The meager reasoning offered by the courts of appeals in justification of their universal injunctions is unpersuasive.

Because a judgment of a court against a defendant does not operate for the benefit of a nonparty, the blithe assumption of the courts of appeals in these cases that their judgments bound the defendant against the world as opposed to the parties in the case is completely unconstitutional. The policy arguments they proffered to justify the universal application of their judgments merely underscore the unconstitutionality of their actions. The Fourth Circuit claimed that its universal injunction was necessary because "[p]laintiffs are dispersed throughout the United States." *IRAP*, 857 F.3d at 605. How does that rationale justify extending the injunction to *non*plaintiffs?

The Fourth Circuit, as did the Ninth Circuit, claimed that the requirement for "uniformity" in immigration law necessitated a universal injunction. *See id.*; *Hawaii*, 859 F.3d at 787. That policy rationale, however, does not negate the Article III requirement that a judgment only binds the parties to a case. Furthermore, lack of uniformity in the application of laws is resolved through appellate

processes, not through district court ukases. See Sup. Ct. R. 10 (listing a conflict between courts as a reason for granting a petition for a writ of certiorari).[20]

The Ninth Circuit quoted the Fourth Circuit for the proposition that not extending the injunction to nonparties would allow the statutory or constitutional violations, as the case may be, to endure in all applications. *Hawaii*, 859 F.3d at 787. True enough. But the remedy is not for the district court to exercise power not bestowed by the Constitution. Other affected persons may file suit for their own benefit and argue that the reasoning in a similar case in another district court should be adopted in their own case. They may not, however, receive the judicial gift of a judgment without an adjudication.[21] Such actions are illegal, protestations of lower courts to the contrary notwithstanding. *See, e.g., Bresgal v. Brock*, 843 F. 2d 1163, 1169 (9th Cir.

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[20] A related incongruity in the issuance of nationwide injunctions for the benefit of nonparties is that the practice "conflicts with the principle that a federal court of appeals's decision is only binding within its circuit." *Virginia Soc. for Human Life v. F.E.C.*, 263 F.3d 379, 393 (4th Cir. 2001). One circuit is not at liberty to impose its view of the law on all the other circuits. *Id.* at 394. Disagreement between circuits provides the Supreme Court with a salutary vetting of the law. "We have in many instances recognized that when frontier legal problems are presented, periods of 'percolation' in, and diverse opinions from, state and federal appellate courts may yield a better informed and more enduring final pronouncement by this Court." *Arizona v. Evans*, 514 U.S. 1, 23 n.1 (1995) (Ginsburg, J., dissenting).

[21] District court opinions are not binding precedent in any other court and, indeed, not even in the district court itself. *Camreta v. Greene*, 131 S. Ct. 2020, 2033 n.7 (2011).

1987) (stating that "[t]here is no general requirement that an injunction affect only the parties in the suit").

E. Collateral damage: the nullification of Rule 23, Fed. R. Civ. P.

The loose use of the universal injunction remedy in the absence of a class action has become so prevalent as to have found its way into the leading treatise on federal practice as early as 1972. *See Sandford v. R.L. Coleman Realty Co., Inc.*, 573 F.2d 173, 178 (4th Cir. 1978) (identifying the "settled rule" that "[w]hether plaintiff proceeds as an individual or on a class suit basis, the requested [injunctive] relief generally will benefit not only the claimant but all other persons subject to the practice or the rule under attack") (quoting 7 Wright & Miller, *Federal Practice and Procedure*, § 1771, at 663-664 (1972)). Nonetheless, the fact remains: "A judgment or decree among parties to a lawsuit resolves issues as among them, but it does not conclude the rights of strangers to those proceedings." *Martin v. Wilks*, 490 U.S. 755, 762 (1989).

The practice of issuing injunctions for the benefit of nonparties without drawing those persons into the case through the class-action mechanism of Rule 23, Fed. R. Civ. P., may be the most widespread systematic violation of the Constitution by the lower federal courts today. That practice makes Rule 23, adopted in 1966, a mere cosmetic formality that courts may use or not use as they desire, but which does not affect the scope of their powers. In a typical statement the *Sandford* court said: "Since the plaintiffs could receive the same injunctive relief in

their individual action as they sought by the filing of their proposed class action, class certification was unnecessary ...." 573 F.2d at 178 (footnote omitted). *But cf. Gregory v. Litton Systems, Inc.*, 472 F. 2d 631, 633 n.4 (9th Cir. 1972) ("[W]e can not hold ... that Rule 23 is a meaningless formality which this court should disregard."). The widespread failure to heed Rule 23 in ideologically charged cases such as those before the Court is a further reason to rein in the undisciplined use of equitable power by the lower courts. *See* Samuel L. Bray, *Multiple Chancellors: Reforming the National Injunction*, at 15 n.67, 131 Harv. L. Rev. (forthcoming 2017)[22] (stating that "Rule 23(b)(2) makes a class-wide injunctive remedy available if certain conditions are met; by implication, this remedy is available only if those conditions are met").[23]

F. The practice of deliberately selecting venues perceived as amenable to the issuance of universal injunctions undermines the reputation of the federal judiciary for fair and neutral adjudication.

The practice of issuing universal rather than party-specific injunctions has proliferated in recent years as a way of nullifying presidential actions.

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[22] *Available at* https://goo.gl/v1WqFw.

[23] Even in the context of class actions, the Supreme Court has urged courts to exercise caution in granting national injunctions. *See Califano v. Yamasaki*, 442 U.S. 682, 701-03 (1979). *See generally* Michael T. Morley, *Nationwide Injunctions, Rule 23(B)(2), and the Remedial Powers of the Lower Courts*, 97 B.U. L. Rev. 615 (2017).

Alert lawyers identify jurisdictions, conservative or liberal as the case may be, that are attuned to their cause and file for a national injunction that, if successful, preempts every other court except the supervising appellate court from ruling differently. To complete the coup, district judges are selected in circuits that are likely to provide favorable review. Thus, under President George W. Bush environmentalists filed for national injunctions in the Ninth Circuit. Under President Obama, opponents of his more grandiose executive actions sought nationwide relief in Texas courts in the Fifth Circuit. Now that a Republican president is again in the White House, liberals have sought to stymie his executive actions by filing for universal injunctions in the Ninth Circuit (Washington and Hawaii) and in the newly liberal Fourth Circuit.[24] The embarrassing spectacle of agenda-driven lawyers successfully filing for national decrees before handpicked judges in carefully selected venues may eventually bring the federal judiciary into disrepute. This Court has an obligation to end that practice and to compel the judges of the lower federal courts to respect the constitutional limits on judicial power.

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[24] For a survey of the relevant cases, *see* Bray, *Multiple Chancellors*, at 8-10; Getzel Berger, *Nationwide Injunctions Against the Federal Government: A Structural Approach*, at 3-4, 92 N.Y.U. L. Rev. (forthcoming 2017), *available at* https://goo.gl/MTTHaU.

G. This case offers the Court the opportunity for a long overdue course correction in the use of equitable power by the lower courts.

The Supreme Court has had two recent opportunities to rein in the improper practice of issuing injunctions for the benefit of nonparties. *See Summers v. Earth Island Inst.*, 555 U.S. 488 (2009) (resolving case on grounds of standing and therefore not reaching "the question whether, if respondents prevailed, a nationwide injunction would be appropriate"); *United States v. Texas*, 136 S. Ct. 2271 (2016) (affirming Fifth Circuit decision upholding a nationwide injunction "by an equally divided Court" with no written opinions). This case presents another opportunity to curtail the misuse of equitable judicial power by the lower federal courts and to call a halt to the unconstitutional practices described above. Should respondents prevail in any degree on justiciability, mootness, and the merits, the opportunity will be ripe for this Court to address the propriety of the remedies ordered below. In that event, this Court will have an opportunity to remind the lower courts that an injunction constrains the defendant's conduct against the plaintiff and no one else.[25]

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[25] Ample and recent scholarship now exists plumbing this issue in depth and surfacing multiple problems with the current practices in the lower courts. In addition to Berger and Bray, *supra*, *see also* Michael T. Morley, *De Facto Class Actions? Plaintiff- and Defendant-Oriented Injunctions in Voting Rights, Election Law, and Other Constitutional Cases*, 39 Harv. J.L. & Pub. Pol'y 487 (2016).

CONCLUSION

The judgments below should be reversed.

Respectfully submitted,

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